DR JEYALAKSHMI RATNAVALE & ORS
v. TAN SRI DR M MAHADEVAN & ORS

HIGH COURT MALAYA, ALOR SETAR
HASHIM HAMZAH J
[CIVIL SUIT NO: 24NCVC-445-05-2014]
13 APRIL 2015

TRUSTS: *Wills – Creation of trust – Application to terminate trust created under will – Whether will created a discretionary trust – Whether beneficiaries in discretionary trust have equitable right to call upon trustees to properly administer trust property – Death of two beneficiaries before exercise of trustee's discretion – Whether late beneficiaries' rights extinguished upon death – Whether surviving beneficiaries had interest over trust property and entitled to determine trust – Whether trust property to be divided equally between surviving beneficiaries – Application of principle 'equality is equity' – Whether most appropriate form of relief between surviving beneficiaries*

This was an application by the plaintiffs for an order of this court to terminate the trust created under the will of Ratnavale, the testator, dated 10 February 1971 ('the said will') and subsequently for all the said properties pleaded therein to be distributed to the surviving six beneficiaries mentioned in the said will. The testator was the father of the six plaintiffs and the brother of the first and second defendants. By virtue of the said will, the testator had appointed the first and second defendants as executors and trustees to his estate ('the said trust'). All six children mentioned in the said will were the six plaintiffs in the present case. However, the other two specifically named beneficiaries, namely Annalakshmi and Ratnamal had both died. The defendants, up until now as executors and trustees appointed under the said will, had not acted or carried out any form of distribution as required of them under the said will upon the testator's death. The plaintiffs herein further prayed for an order to terminate the said trust and for the trust property to be divided equally as between the surviving beneficiaries. The issues that arose were (i) whether the said will created a discretionary trust; (ii) whether the plaintiffs had any interest over the trust property; (iii) whether the plaintiffs were entitled to determine the said trust; (iv) whether the trust property could be divided equally as between the surviving beneficiaries (the plaintiffs).

Held (allowing plaintiffs' application with costs):

(1) There is a power granted to the trustee to carry out either a selection or a decision in which the testator himself may not be able to do at the time the will is written. Therefore, there is an element of uncertainty in a discretionary trust. Such uncertainty includes, among others, the determination of who shall benefit from the discretionary trust (beneficiaries) or the amount of those benefits (quantification) or whether any benefit is to be distributed at all. By virtue of para. 3 of the

said will, the beneficiaries were specifically mentioned and ascertainable but the amount of which each beneficiary was entitled to the trust property, upon the testator's death, was left to be determined by the trustees in the exercise of their discretion. As such, the discretionary power of the trustees is limited only to distribute the property of the testator at a proportion they deem fit. This was, therefore, an exhaustive type of discretionary trust. (paras 16 & 18)

(2) Beneficiaries in a discretionary trust have an equitable right to call upon the trustees to properly administer the trust property, namely to have the trust property be distributed as amongst the beneficiaries in a proper manner. This equitable chose of action extinguished upon the beneficiary's death. In the present case, two of the named beneficiaries namely, Annalakshmi and Ratnamal, had died before the exercise of the trustees' discretion in distributing the trust property upon the testator's death. The late Annalakshmi and Ratnamal, being beneficiaries under a discretionary trust created by the testator, held no contingent interest over the trust property which was yet to be determined at the time of their death. No property had been passed down to them during their lifetime and surely after their death. Their rights extinguished upon their death. The equitable rights and interests of another six surviving beneficiaries were still in existence. (paras 20, 21 & 22)

(3) The cardinal principle in the case of *Saunders v. Vautiers* is that when a beneficiary has attained *sui juris*, he may determine or terminate the discretionary trust which is held in his favour. A discretionary trust should be as clear as it can be so as to enable the court to control and execute the will and the trust, insofar as the court could, in line with the testator's intention manifested in the said will. This includes, but is not limited to, the application of an equitable principle of 'equality is equity'. This principle is usually applicable in an exhaustive discretionary trust where the beneficiaries are usually family members. Based on the evidence presented herein, the equitable principle of 'equality is equity' is not only applicable, but the most appropriate form of relief in the present case as between the surviving beneficiaries. (paras 24, 28 & 29)

Case(s) referred to:

Chief Commissioner of Stamp Duties v. Buckle [1998] 192 CLR 226; 151 ALR 1 ***(refd)***
Federal Commissioner of Taxation v. Vegners [1989] 90 ALR 547 ***(refd)***
Gartside v. Inland Revenue Commissioners [1968] AC 553 ***(refd)***
Inland Revenue Commissioners v. Broadway Cottages Trust [1955] Ch 20 ***(refd)***
McPhail v. Doulton [1970] 2 All ER 228 ***(refd)***
Panchanath Ratnavale v. Sandra Segara Mahalingam & Ors [2012] 1 LNS 167 HC ***(refd)***
Re Gourju's Will Trusts [1943] Ch 24 ***(refd)***
Re Gulbenkian's Settlement Trusts (No. 2) [1970] Ch 408 ***(refd)***
Saunders v. Vautiers [1841] 49 ER 282 ***(refd)***

For the plaintiffs - K Govindaraju; M/s G Raju & Co
For the defendants - Davidson; M/s Azman Davidson & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Hashim Hamzah J:

Introduction

[1] This is an application by the plaintiffs for an order of this court to terminate the trust created under the will of Ratnavale, the testator, dated 10 February 1971 (hereinafter referred to as "the said will") and subsequently for all the said properties pleaded therein to be distributed to the surviving six beneficiaries mentioned in the said will.

[2] The properties are GM 845, Lot 290, Mukim Kulim, Daerah Kulim, Kedah and GM 621, Lot 461, Mukim Kulim, Daerah Kulim, Kedah.

Background Facts

[3] The testator was the father of the six plaintiffs and the brother of the first and second defendants.

[4] By virtue of the said will, the testator had appointed the first and second defendants as executors and trustees to his estate (hereinafter referred to as "the said trust").

[5] The said will, at para. 3 provides as follows:

> I hereby bequeath and devise all my movable and immovable property of whatsoever nature or description and wheresoever situate subject to the payment of my debt, funeral, testament and administration expenses to my legally married wife ANNALAKSHMI, my mother Madam RATNAMAL and all my six (6) children in whatever proportion my said trustees at their discretion shall choose to distribute.

[6] It was never disputed that all six children mentioned in the said will were the six plaintiffs in the present case.

[7] However, the other two specifically named beneficiaries, namely Annalakshmi and Ratnamal had both died. Annalakshmi died on 26 October 2010 and Ratnamal died on 29 December 1994. The testator died on 9 April 1973.

[8] It was never disputed, as a matter of fact that, up until now, the defendants as executors and trustees appointed under the said will had not acted or carried out any form of distribution as required of them under the said will upon the testator's death.

A **First Issue: Whether The Said Will Created A Discretionary Trust**

[9] Paragraph 3 of the said will provides that:

> I hereby bequeath and devise all my movable and immovable property of whatsoever nature or description and wheresoever situate subject to the payment of my debt, funeral, testament and administration expenses to my legally married wife ANNALAKSHMI, my mother Madam RATNAMAL and all my six (6) children **in whatever proportion my said trustees at their discretion shall choose to distribute**.
>
> (emphasis added)

[10] The plaintiffs in the present case submitted that para. 3 of the said will as quoted above had created a discretionary trust whereby a wide discretion was given to the defendants as executors and trustees of the said trust to determine the proportion of the testator's properties that each beneficiary (which were already specified in the said will) were to receive upon the testator's death.

[11] The plaintiffs in the present case relied heavily on the finding of the High Court in the case of *Panchanath Ratnavale v. Sandra Segara Mahalingam & Ors* [2012] 1 LNS 167 whereby Harmindar Singh Daliwal JC held that:

> I think it is also important to recall that D1 and D2 were operating what is termed as a discretionary trust. *This was because D1 and D2 as Executors and Trustees were given the power and discretion to distribute the assets of Ratnavale after payment of debts and expenses "in whatever proportion my said trustees at their discretion shall chose to distribute"*. In the *Law of Trust* by JG Riddall, 6th Edition, discretionary trust is defined as follows (at 283):
>
> > A discretionary trust is one under which discretion is conferred by the settlor on the trustees to decide which member or members of a class of beneficiaries should be entitled to the trust property ...
> >
> > *The terms of a discretionary trust may give trustees discretion not only as to which beneficiary or beneficiaries should take, but also as to whether to make any distribution of trust property (capital or income as the case may be) at all ...*
> >
> > A beneficiary who receives nothing under the trust has no grounds for attacking the trustees' exercise of their discretion unless he can show that the trustees have acted capriciously (eg, if they selected beneficiaries according to their height or complexion), or corruptly or otherwise in bad faith. If the trustees have acted in good faith then the court will not interfere with their decision.
>
> **It was therefore the case that D1 and D2 were given a wide discretion or latitude in the distribution of trust property**. They could have given all the assets to Madam Ratnammal with paltry sums to the rest if they had thought it fit. That would still be in accordance with the Will and Ratnavale's wishes. Their only duty was not to act capriciously but in good faith at all times.
>
> (emphasis added)

[12] I find no reason to depart from such finding. A

[13] A classic example of what amounts to a discretionary trust, as held by Gummow J in *Federal Commissioner of Taxation v. Vegners* (1989) 90 ALR 547 is that:

> A species of express trust, one **where the entitlement of beneficiaries to income**, or to corpus, or both, **is not immediately ascertainable. Rather, the beneficiaries are selected from a nominated class by the trustee or some other person** and this power may be exercisable once or from time to time. B
>
> (emphasis added)

C

[14] However, this example is by no means exhaustive. Recent cases have shown that the courts are becoming more liberal in its interpretation and determination of whether a trust can be regarded as a discretionary trust.

[15] In *Chief Commissioner of Stamp Duties v. Buckle* (1998) 192 CLR 226; 151 ALR 1, it was observed that the meaning of the term "discretionary trust" is: D

> disclosed by a consideration of usage rather than doctrine, and the usage is descriptive rather than normative ... "discretionary trust" has no fixed meaning and is used to describe particular features of certain express trusts. E

[16] I am of the view that these particular features of discretionary trust includes, but not limited to, the fact that there is a power granted to the trustee to carry out either a selection or a decision in which the testator himself may not be able to do at the time the will is written. Therefore, there is an element of uncertainty in a discretionary trust. Such uncertainty includes, among others, the determination of who shall benefit from the discretionary trust (beneficiaries) or the amount of those benefits (quantification) or whether any benefit is to be distributed at all. F

[17] Learned counsel for the defendants contended that a discretionary trust must confer such discretionary power to the trustees so as to be able to determine or to create a class of beneficiaries, which was absent in the present case. G

[18] However I find that, by virtue of para. 3 of the said will, the beneficiaries were specifically mentioned and ascertainable but the amount of which each beneficiary is entitled to the trust property, upon the testator's death, are left to be determined by the trustees in the exercise of their discretion. As such, the discretionary power of the trustees is limited only to distribute the property of the testator at a proportion they deem fit. This is, therefore, an exhaustive type of discretionary trust. H I

Second Issue: Whether The Plaintiffs Have Any Interest Over The Trust Property

[19] The general rule is that, in a discretionary trust, the objects or the beneficiaries have no vested or contingent interest over the trust property and the interest of a beneficiary under this type of trust is a mere right to be considered, meaning that the beneficiary in a discretionary trust owns no property until such property is distributed in accordance with the will (see the judgment by Lord Reid in *Gartside v. Inland Revenue Commissioners* (1968) AC 553). A discretionary trust is of such ambiguous (but not unascertainable) nature in terms of who should get which property and in what amount.

[20] Nevertheless, beneficiaries in a discretionary trust have an equitable right to call upon the trustees to properly administer the trust property, namely to have the trust property to be distributed as amongst the beneficiaries in a proper manner. This equitable chose of action extinguishes upon the beneficiary's death. (see *Gartside v. Inland Revenue Commissioners* (*supra*) and *Re Gulbenkian's Settlement Trusts (No. 2)* (1970) Ch 408).

[21] In the present case, two of the named beneficiaries, namely Annalakshmi and Ratnamal have died before the exercise of the trustees' discretion in distributing the trust property upon the testator's death.

[22] I am of the opinion based on the principles enunciated above that the late Annalakshmi and Ratnamal, being beneficiaries under a discretionary trust created by the testator, held no contingent interest over the trust property which was yet to be determined at the time of their death. No property had been passed down to them during their lifetime and surely after their death. Their rights extinguish upon their death. The equitable rights and interests of another six surviving beneficiaries (the plaintiffs in the present case) are still in existence. What are the surviving beneficiaries' courses of action from here onwards?

Third Issue: Whether The Plaintiffs Are Entitled To Determine The Said Trust

[23] The plaintiffs in the present case pleaded for an order of this court to terminate the said trust.

[24] The answer to this issue can be seen in the case of *Saunders v. Vautiers* (1841) 49 ER 282 whereby the cardinal principle in that case is that when a beneficiary has attained *sui juris*, he may determine or terminate the discretionary trust which was held in his favour.

Fourth Issue: Whether The Trust Property Can Be Divided Equally As Between The Surviving Beneficiaries (The Plaintiffs)

[25] In the present case, it was never disputed by the parties that the defendants being the trustees appointed under the said will had never once exercised their discretion in distributing the trust property from the date of

the testator's death. It is the duty of the trustees to distribute the trust property within a reasonable time after the trust property is available for distribution in cases involving an exhaustive discretionary trust (such as in the present case). (*Re Gourju's Will Trusts* (1943) Ch 24 and *Re Gulbenkian's Settlement Trusts (No. 2)* (*supra*)).

[26] Therefore, the plaintiffs in the present case, proceeded to pray for an order from this court to terminate the said trust and for the trust property to be divided equally as between the surviving beneficiaries. This is the most popular form of relief sought by the beneficiaries whenever dispute arises in a discretionary trust.

[27] In the case of *Inland Revenue Commissioners v. Broadway Cottages Trust* (1955) Ch 20 it was held at p. 30 of the report as follows, in determining whether a discretionary trust is a valid trust:

> Secondly, **if the class of beneficiaries was an ascertainable class**, it would or might be **possible to imply a trust in default of distribution by the trustees for all the members of the class in equal shares**, and **that would be a trust which the court could control and execute**. But as the class is unascertainable, no such trust can be implied.
>
> (emphasis added)

[28] The basis of the decision in the abovementioned case is that a discretionary trust should be as clear as it can be so as to enable the court to control and execute the will and the trust, insofar as the court can, in line with the testator's intention manifested in the said will. This includes, but not limited to, the application of an equitable principle of "equality is equity". This principle is usually applicable in an exhaustive discretionary trust where the beneficiaries are usually family members (see *McPhail v. Doulton* [1970] 2 All ER 228).

[29] I am of the view that based on the evidence presented before me in the present case that the equitable principle of "equality is equity" is not only applicable, but the most appropriate form of relief in the present case as between the surviving beneficiaries.

Fifth Issue: Ancillary Issues

[30] The first ancillary issue is the issue of *res judicata* (as regards to the nature of the said will). This issue was raised by the plaintiffs. I find that the decision in *Panchanath Ratnavale v. Sandra Segara Mahalingam & Ors* (*supra*) which was heavily relied upon by the plaintiffs were regarding a separate issue and did not attract the doctrine of *res judicata*. However, my findings as regards to the nature of the trust created by the said will has been addressed above.

[31] The second ancillary issue is the attempt of the defendants to include the property in Pulau Pinang (Lots 743, 744, 745 and 747, Section 3, Daerah Timur Laut, Pulau Pinang) as a subject matter in the present case. This

matter had been adjudicated up until the Federal Court. It was held that the said property above was not part of the trust property of the testator under the said will. Parties in the present case shall not be allowed to re-litigate on this issue.

Conclusion

[32] As such, based on the evidence presented before this court, and after hearing the submissions by both parties, the plaintiffs' application *vide* encl. (1) is allowed with costs of RM3,000.